ROBINSON GRAY
Litigation + Business

SAMUEL J. WELLBORN
DIRECT 803 231.7829 DIRECT FAX 803 231.7878
swellborn@robinsongray.com

July 30, 2020

VIA ELECTRONIC FILING

The Honorable Jocelyn Boyd
Chief Clerk / Executive Director
Public Service Commission of South Carolina
101 Executive Center Drive, Suite 100
Columbia, SC 29210

Re: Enrique McMilion, Jr. v Duke Energy Carolinas, LLC
Docket No. 2019-331-E

Dear Ms. Boyd:

I am filing this letter on behalf of Duke Energy Carolinas, LLC (the "Company") in response to Complainant's request for rehearing filed with the Commission on July 20, 2020.

First, Mr. McMilion's request for rehearing was filed beyond the statutory deadline and is therefore time-barred. Order No. 2020-342, the order which Mr. McMilion asks the Commission to reconsider, was entered on June 30, 2020. According to the Commission's Docket Management System, the order was electronically sent to Mr. McMilion three days later on July 3, 2020 at 4:15 pm. Pursuant to S.C. Code Ann. § 58-27-2150, parties must file a request for rehearing "ten days after service of notice of the entry of the order or decision." Therefore, Mr. McMilion's request for rehearing was due on or before July 13, 2020, but was instead filed one week beyond that date.

According to an email from Mr. McMilion dated July 11, 2020 filed in this docket on July 14, 2020, Mr. McMilion appears to believe that the ten-day clock does not begin to run until he has clicked the link within the service email to confirm his receipt of service of the order. If that were true, a party could simply wait to click the "confirm link," even though he has received the order, and artificially extend the statutorily prescribed time by which one must request rehearing. Such a scenario is precluded by the plain language of S.C. Code Ann. § 58-27-2150, which starts the clock for filing a request for rehearing "within ten days after service of notice of the entry of the order or decision." That date in this case for Mr. McMilion was July 13, 2020, and his request for rehearing is statutorily time-barred. *See, e.g.*, S.C.R.C.P. 5(b)(1)

("Service by mail is complete upon mailing of all pleadings and papers subsequent to service of the original summons and complaint.").

Second, Mr. McMilion's request for rehearing—even if it were properly before the Commission—fails to meet the minimum requirements of S.C. Code Ann. Regs. 103-825(A)(4), which requires that requests for rehearing "set forth clearly and concisely: (a) The factual and legal issues forming the basis for the petition; (b) The alleged error or errors in the Commission order; (c) The statutory provision or other authority upon which the petition is based." Rather than setting forth clearly and concisely how the Commission erred in Order No. 2020-346, the arguments Mr. McMilion proffers in his request for rehearing simply rehash that which was argued in his more than two dozen filings in Docket Nos. 2018-379-E, 2019-230-E, and 2019-331-E.

Finally, Mr. McMilion asserts that the issues raised in this case are not precluded from Commission consideration under the theory of res judicata because, he asserts, the issues in this case are novel and because the res judicata doctrine was not presented in the Company's answer to the Complaint. The issues in this case are, of course, not novel and are the very issues already substantively considered by the Commission in Docket Nos. 2018-379-E and 2019-230-E, i.e., the installation of a smart meter at Mr. McMilion's property. Moreover, "[t]he doctrine [of res judicata] bars not only the claims that were actually raised, but also those issues *which might have been* raised in the former suit." *RIM Associates v. Blackwell*, 359 S.C. 170, 183(S.C. App. 2004) (emphasis original). To the extent Mr. McMilion views the issues in this case as being distinct from those previously considered by the Commission, certainly the issues "might have been raised" in one of the prior actions brought by him before the Commission.

Furthermore, while it is correct that res judicata is waived if not pled, it *was* pled by the Company, and the doctrine of res judicata is not so narrow as to require its invocation exclusively within a party's answer. Mr. McMilion has made no less than seventeen filings in this docket alone, and to limit the Company to only that which was filed in its Answer would be unnecessarily and unduly prejudicial. The purpose of requiring the pleading of affirmative defenses, such as res judicata, "is the prevention of unfair surprise. A defendant should not be permitted to 'lie behind a log' and ambush a plaintiff with an unexpected defense." *Garrison v. Target Corp.*, 429 S.C. 324, 360 (S.C. App. 2020). The Company's res judicata argument was proffered in a filing made on February 10, 2020, after which the Commission issued Order No. 2020-142, granting Mr. McMilion's request for additional time to make an additional filing with the Commission. Mr. McMilion thereafter made five additional filings with the Commission in this docket, none of which addressed the issue of res judicata.

The Company appreciates this opportunity to respond to Mr. McMilion's request for rehearing.

Kind regards,

Sam Wellborn

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cc: Enrique McMilion, Jr., (via email and US Mail)
Jeffrey M. Nelson, ORS Chief Legal Officer Counsel (via email)
Carri Grube Lybarker, SC Consumer Advocate (via email)
Roger P. Hall, Esquire, SC Consumer Advocate (via email)
Heather Shirley Smith, Deputy General Counsel (via email)
Rebecca J. Dulin, Associate General Counsel (via email)